

KENICHI HATTORI & ANOR

a

v.

MINORU YAMASHITA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR

b

RAMLY ALI J

[CIVIL SUIT NO: D5-22-1472-2003]

15 OCTOBER 2003

CIVIL PROCEDURE: Jurisdiction - Court - Writ of summons - Application to set aside on lack of jurisdiction - Plaintiffs and 1st defendant Japanese citizens residing in Japan whilst 2nd defendant a Malaysian company - Whether High Court had jurisdiction to hear action - Whether jurisdiction conferred by s. 23(1)(b) Courts of Judicature Act 1964 in view of Malaysian defendant company

c

CIVIL PROCEDURE: Action - Forum non-conveniens - Plaintiffs and 1st defendant Japanese citizens residing in Japan whilst 2nd defendant a Malaysian company - Whether action should be tried in Japan - Whether Malaysian court was suitable forum as it had the most real and substantial connection with the action

d

This was the 1st defendant's application to set aside the plaintiffs' writ of summons under O. 12 r. 7 of the Rules of the High Court 1980 ('RHC'). The grounds of the application were that the Malaysian courts lacked the jurisdiction to try this action and that Malaysia was *forum non-conveniens* as the action ought to be tried in Japan. The 1st defendant contended that even though the 2nd defendant was a Malaysian company, the plaintiffs and the 1st defendant were Japanese citizens residing in Japan. Further, the plaintiffs' action against the defendants was based on an alleged trust arrangement that was executed in Japan.

e

f

Held:

g

[1] Civil jurisdiction of the Malaysian High Courts is governed by s. 23(1) of the Courts of Judicature Act 1964 ('CJA'). It is not necessary to establish jurisdiction in respect of all the sub-paras. (a), (b), (c) and (d) of s. 23(1). It is sufficient if the plaintiffs could show that their action fell in any one of those sub-sections. The plaintiffs' present action fell under sub-para (b) of s. 23(1), as the 2nd defendant being a Malaysian company was within the local jurisdiction of the court. Also, there is no requirement in s. 23(1)(b) CJA that the defendant must be a defendant where the plaintiff has a cause of action. To introduce this requirement would

h

i

- a* tantamount to adding words to the provisions of the section which were precise and unambiguous. The literal and strict interpretation of the section should apply. Further, the position of the 2nd defendant was not trivial. The 2nd defendant was a substantial and necessary defendant in the present action. This could be seen in the numerous references to the 2nd defendant in the statement of claim. In the circumstances, this court had the jurisdiction to try the action. (pp 498 i, 499 a-e, 500 h & 501 a-d)
- b*

- c* [2] On the issue of *forum non-conveniens*, the 1st defendant failed to discharge his burden of showing that there was an available forum in Japan that was clearly or distinctly more appropriate than the Malaysian High Court. The 1st defendant merely stated in the affidavit in support of his application that the High Court of Japan would be a more suitable and appropriate forum to try this action. This bald assertion did not assist the court. Nowhere had the 1st defendant explained whether such a court existed or had he given details of the power or competent jurisdiction of that court.
- d* In particular, the 1st defendant had not shown that a court existed in Japan which had the power to issue binding orders which bound not only the Japanese parties but also the 2nd defendant which was a Malaysian company. Further, the 1st defendant had not shown that a Japanese court had the power to grant binding orders in the terms of the relief sought by the plaintiffs. (pp 502 f-h & 503 a)
- e*

- [3] The High Court of Malaya at Kuala Lumpur was the proper forum to try this action. It was the only forum in which the plaintiffs might seek the relief claimed and it was the forum that had the most real and substantial connection with the action. (p 503 b-c)
- f*

[Application of 1st defendant dismissed.]

Case(s) referred to:

American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor [1995] 1 CLJ 273 SC (*refd*)

- g* *Hooghly Mills Co Ltd v. Seltron Pte Ltd* [1995] 1 SLR 773 (*refd*)
Malayan Banking Bhd v. International Tin Council & Anor [1989] 2 CLJ 961;
 [1989] 1 CLJ (Rep) 87 SC (*refd*)

Legislation referred to:

Courts of Judicature Act 1964, s. 23(1)(a), (b), (c)

- h* Federal Constitution, art. 128

Rules of the High Court 1980, O. 12 r. 7

For the plaintiffs - David Morais (R Thayalan); M/s Zaid Ibrahim & Co

For the 1st defendant - Ben Chan; M/s Lee Hishamuddin & Co

For the 2nd defendant - AT Aun; M/s AT Aun & Assoc

- i* Reported by Usha Thiagarajah

JUDGMENT

Ramly Ali J:

This is an application by the 1st defendant (encl. 11) to set aside the plaintiff's writ of summon under O. 12 r. 7 of the Rules of the High Court (RHC) 1980, on the ground that this court does not have the jurisdiction to try this action.

Alternatively, the 1st defendant applies that the action be stayed on the ground that Malaysia is forum non-conveniens and that the action ought to be heard in Japan.

The grounds of the application are, among others, as follows:

- (a) the plaintiffs' cause of action is based on an alleged trust arrangement entered into between the plaintiffs and the 1st defendant in Tokyo, Japan;
- (b) the plaintiffs and the 1st defendant are Japanese Citizen and reside in Japan;
- (c) the breach of the alleged trust arrangement occurred in Japan;
- (d) the Malaysian High Courts lack prerequisite jurisdiction to try the action; and
- (e) in the alternative, the more suitable and appropriate forum to try the plaintiffs' alleged claim would be the High Courts of Japan.

Facts Of The Case

The facts of the case as appear in the statement of claim are as follows:

The 1st plaintiff is the registered owner of 24,499 shares in the 2nd defendant and has an address at 1-32-16-602, Adachi-ku, Tokyo, Japan.

The 2nd plaintiff is the registered owner of 24,499 shares in the 2nd defendant and has an address at 706, 2-16-5 Kameari Katsushika-ku, Tokyo 125-006, Japan.

The 1st defendant is the registered owner of 50,998 shares in the 2nd defendant and has an address at 1-12-19 Minami Mizumoto, Katsushika-ku, Tokyo, Japan. By letter dated 27 August 2003, Messrs Lee Hishamuddin of Level 16, Menara Asia Life, 189, Jalan Tun Razak, 50400 Kuala Lumpur, solicitors for the 1st defendant have confirmed to the plaintiffs' solicitors that they have instruction to accept service of process on behalf of the 1st defendant.

The 2nd defendant is a company incorporated in Malaysia having its registered address and a place of business at Suites 7.21 & 7.22, 7th Floor, Imbi Plaza, Jalan Imbi, 55100 Kuala Lumpur, Malaysia.

a The 2nd defendant is part of the Nikko group of companies. The group as a whole is in the business of the manufacture and sale of toys, dies and plastic products. The principal company, Nikko Co Ltd, is based in Japan but the group has affiliates and subsidiaries in Europe, the United States and Asia. Nikko Co Ltd is owned by the Hattori and Yamashita families.

b The principal asset of the 2nd defendant is its shareholding in Nikko Electronic Berhad (NEB). NEB is in the business of the manufacture for export and sale of toys.

c Both the plaintiffs are the registered owners of 24,449 shares each in the 2nd defendant, with an aggregate of 48,998 shares.

The 1st defendant is the registered of 50,998 shares in the 2nd defendant.

The entire shareholding structure of the 2nd defendant is as follows:

<i>d</i>	SHAREHOLDER	NO. OF SHARES	PERCENTAGE
	Minoru Yamashita (1st defendant)	50,998	50.9%
	Kenichi Hattori (1st plaintiff)	24,499	24.45%
<i>e</i>	Yuji Hattori (2nd Plaintiff)	24,499	24.45%
	Isao Hattori	1	0.05%
<i>f</i>	Mieko Hattori	1	0.05%
	Hiromi Nakagawa	1	0.05%
	Yasuharu Yamashita	1	0.05%

g Isao Hattori is the plaintiffs' uncle and Mieko Hattori is their mother. The plaintiffs, Isao Hattori and Mieko Hattori are collectively referred to as "the Hattori Family".

h Hiromi Nakagawa is the daughter of the 1st defendant, Hiromi Nakagawa and Yasuharu Yamashita are collectively referred to as the "Yamashita Family".

As can be seen from the shareholding structure of the 2nd defendant, the Hattori Family owns 49,000 shares which is 49% of the equity in the 2nd defendant while the Yamashita Family owns 51,000 shares which is 51% of the equity in the 2nd defendant.

i

The 2nd defendant was the owner of 49,600,000 share in NEB, which is 50.1% of its equity. Accordingly, the Yamashita Family indirectly owned 51% of the 49,600,000 shares in NEB and the Hattori Family indirectly owned the balance 49% of the 49,600,000 shares in NEB.

a

On or about 28 August 2001, the 1st defendant, who was then the Chairman of the 2nd defendant, verbally agreed, on behalf of the 2nd defendant, to purchase 15,000,000 shares in NEB from one Tan Sri Rashid Hussain ("TSRH") at a purchase price of RM8.50 per share for a total of RM127,500,000. This agreement was reached without the approval of the plaintiffs and the 2nd defendant.

b

The purchase from TSRH of the 15,000,000 shares in NEB was not completed resulting in a dispute between TSRH and the defendants.

c

The dispute was settled by a written agreement dated 5 February 2002 entered into between one Yong Kim Moi, as nominee for TSRH, and the 1st and 2nd defendants. The settlement sum was agreed at RM37,680,000 to be paid by the transfer of 12,000,000 shares in NEB held by the 2nd defendant.

d

The Hattori Family were not consulted on the initial agreement to sell 15,000,000 shares in NEB to TSRH. They were similarly placed in a position of having no choice but to agree to the terms of the settlement to avoid any litigation against the 2nd defendant and NEB.

e

The settlement was to be effected by the transfer of 12,000,000 shares of NEB held by the 2nd defendant.

As the settlement was forced on the Hattori Family and the 2nd defendant by the unauthorised actions of the 1st defendant, a second agreement was reached between the Yamashita and Hattori Families ("the 2nd settlement").

f

By the 2nd settlement, it was agreed as follows:

- (1) that of the 12,00,000 shares, 4,000,000 would be credited to the Hattori Family, and 8,000,000 shares would be credited to the 1st defendant.
- (2) that the 1st defendant would hold on trust 5,000 shares in the 2nd defendant for the Hattori Family and that the same would be transferred when necessary. This trust arrangement shifted the controlling equity in the 2nd defendant from the 1st defendant to the Hattori Family. The Hattori Family would now own 54% of the equity of the 2nd defendant and the Yamashita Family's holding would be reduced to 46%.

*g**h**i*

- a* The 2nd settlement between the Hattori and Yamashita Families was reached at a meeting in Tokyo on 12 March 2002 at which the 1st plaintiff, the 1st defendant and one Mr. Ban Motoharu were present. The 2nd settlement was partially recorded in a memorandum of understanding, also dated 12 March 2002.
- b* The actual number of shares to be held on trust under the 2nd settlement was not provided in the memorandum of understanding. However, the process for determining the shares is based on the following formula:
- c* (1) Determining the ownership of the Yamashita and Hattori Families, through the 2nd defendant, in NEB. This is calculated at 25,295,490 shares in NEB owned by the Yamashita Family and 24,303,510 by the Hattori Family.
- d* (2) The deduction of the shares credited to the Hattori and Yamashita Families under the 2nd settlement is then made. This leads to the Hattori Family indirectly owning a reduced shareholding of 20,303,510 shares in NEB and the Yamashita Family owning a reduced shareholding of 17,295,490 shares.
- e* (3) With the reduced shareholdings in NEB, the Yamashita Family now held 46% of the 2nd defendant's equity in NEB and the Hattori Family now held 54%.
- f* (4) To reflect the change in the indirect shareholding in NEB, a similar proportional adjustment was made to the shareholding in the 2nd defendant. The original 51,000 shares in the 2nd defendant held by the Yamashita Family would be reduced to 46,000 shares and the Hattori Family shares would be increased from 49,000 shares to 54,000 shares.
- g* (5) The net effect of the 2nd settlement is for the 1st defendant to hold on trust 5,000 shares in the 2nd defendant for the plaintiffs.
- Following the 2nd settlement, the 1st defendant stepped down as Chairman and resigned as director of the 2nd defendant.
- h* The plaintiffs, through their solicitors, issued a letter dated 25 June 2003 to the 1st defendant demanding transfer of the 5,000 shares. That letter enclosed the method of calculation of the transfer shares and the transfer documents.
- i* The plaintiffs' solicitors' letter was handed to the 1st defendant personally on 30 June 2003 in Kuala Lumpur.
- As at the date of filing of this action, the 1st defendant has failed, refused and/or neglected to execute and return the transfer documents to the plaintiffs' solicitors or to the plaintiffs.

On 29 August 2003 the plaintiffs filed the present action against all the defendants. On the same date the plaintiffs also filed a summons-in-chambers for an *ex parte* injunction restraining the 1st defendant from dealing with the 5,000 shares in the 2nd defendant held by him in trust for the plaintiffs in anyway whatsoever pending the final disposal of the plaintiff's action; and to restrain the 1st defendant from exercising any rights whatsoever over the 5,000 shares in the 2nd defendant held by him in trust for the plaintiffs in the proposed EGM to be held on 24 September 2003 or any other general meeting of the 2nd defendant pending the final disposal of the present action.

Alternatively, the plaintiffs are praying for an order restraining the 2nd defendant from holding the proposed EGM on 24 September 2003 requisitioned by the 1st defendant or any other general meeting of the 2nd defendant for the purpose of altering the composition of the Board of Directors of the 2nd defendant or to dispose or deal with the assets of the 2nd defendant pending the final disposal of the plaintiff's action.

Defendant's Arguments

In the present application, (encl. 11), the 1st defendant stressed that the 1st plaintiff, 2nd plaintiff and 1st defendant all reside in Japan. According to the 1st defendant, even though the 2nd defendant is a Malaysian company, all the shareholders are Japanese and reside in Japan. The shareholders are family members of the plaintiffs and the defendants. The defendants also stressed that the alleged trust arrangement was reached in Tokyo on 12 March 2002 between the plaintiffs and the 1st defendant in the presence of one Ban Motoharu, who is also a Japanese, residing in Japan. The 1st defendant also stressed that the alleged trust arrangement was "partially" recorded in a MOU which was in Japanese language.

The 1st defendant also argued that none of the provisions of s. 23(1)(a)-(d) of the Courts of Judicature Act 1964 (CJA) applies to confer jurisdiction to Malaysian courts. The 1st defendant contended that s. 23(1)(b) of CJA envisages that the defendant must be a defendant where the plaintiff has a cause of action. In the present case, the 1st defendant argued that since the alleged trust arrangement was entered in Japan and all the parties are Japanese residing in Japan the cause of action arose ie, any breach of the alleged trust arrangement, must be in Japan, not in Malaysia. Therefore the 1st defendant concluded that the High Court in Malaysia has no jurisdiction to try this case.

On the question of *forum non-conveniens* the 1st defendant argued that even if Malaysian courts are seized with jurisdiction to try this action, it ought to decline jurisdiction on the doctrine of *forum non-conveniens*. The 1st defendant contended that the High Court of Tokyo is the more suitable and appropriate forum to hear and try the plaintiff's claim on the grounds that:

- a* (a) all the parties in the alleged trust arrangement are Japanese residing in Japan;
- (b) Bon Motoharu, who witnessed the MOU is also a Japanese residing in Japan;
- b* (c) no other relevant witnesses are from Malaysia;
- (d) the alleged trust arrangement was entered in Japan;
- (e) the plaintiffs has failed to discharge their burden to show that there are circumstances by reason of which justice requires that a stay should not be granted.
- c*

Plaintiffs' Arguments

- The plaintiffs on the other hand argued that Malaysian Court has jurisdiction to hear and try this action under s. 23(1)(a), (b) and (c) of CJA because one of the defendants (the 2nd defendant) is a Malaysian company having its registered address and a place of business at Suite 7.21 & 7.22, 7th Floor, Imbi Plaza, Jalan Imbi, 55100 Kuala Lumpur, Malaysia. The plaintiffs further submitted that the 2nd defendant in any event is a substantial and necessary defendant in the present action.
- d*
- e* On the question of *forum non-conveniens* the plaintiffs contended the 1st defendant has failed to discharge his burden of showing that another forum exists which is clearly and distinctly more appropriate to try this action. The plaintiffs further contended that Malaysian Court is the forum conveniens to try this action as it has the most real and substantial connection with the action.
- f* Further, the plaintiffs submitted that it would be unjust and inappropriate to require the plaintiffs to seek their relief elsewhere.

Findings Of The Court

- At the outset, the court must stress that the issue of the court's jurisdiction to try the action and the issue of *forum non-conveniens* are two separate matters which need separate considerations. In the matter of the challenge to jurisdiction, it is the very authority of the court to try the action that is being challenged. On the question of forum, it is for the defendant to satisfy the court that notwithstanding that it has jurisdiction, there exists some other tribunal or court of competent jurisdiction which is clearly and distinctly more appropriate than the Malaysian Court to try this action. The difference between the two matters has been clearly dealt with by the Supreme Court in *American Express Bank Ltd v. Mohammad Toufic Al-Ozeir and Another* [1995] 1 CLJ 273.
- g*
- h*

Jurisdiction

- i* Civil jurisdiction of the Malaysian High Courts is governed by s. 23(1) of CJA, which reads as follows:

23. Civil jurisdiction – general

a

(1) Subject to the limitations contained in art. 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:

(a) the cause of action arose, or

b

(b) the defendant or one of several defendants resides or has his place of business, or

(c) the facts on which the proceedings are based exist or are alleged to have occurred, or

c

(d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

d

It is not necessary to establish jurisdiction in respect of all the sub-paras. (a) (b), (c) and (d) above. It is sufficient if the plaintiffs can show that their action falls in any one of those sub-paragraphs.

In the present action the court is satisfied that the plaintiffs' action falls under sub-para. (b) of s. 23(1) CJA ie, the defendant or one of the several defendants resides or has his place of business within the local jurisdiction of the court.

e

In the present case, the 2nd defendant is a private limited company incorporated in Malaysia. This is clear on the face of the writ and at para. 4 of the statement of claims which states:

f

The 2nd Defendant is a company in Malaysia having its registered address and a place of business at Suite 7.21 & 7.22, 7th Floor, Imbi Plaza, Jalan Imbi, 55100 Kuala Lumpur, Malaysia.

As the 2nd defendant is a Malaysian company this court has jurisdiction to try this action against *inter alia* the 1st defendant notwithstanding that the 1st defendant is a resident in Japan. This has been conclusively established in the decision of the Supreme Court per Mohamed Azmi SCJ in *Malayan Banking Bhd. v. International Tin Council & Another* [1989] 2 CLJ 961; [1989] 1 CLJ (Rep) 87.

*g**h**i*

a ... s. 23(1)(b) of the Courts of Judicature Act 1964 provides extra-territorial jurisdiction to the High Court in cases where foreigners overseas are sued as co-defendants with local residents. Our attention has been drawn to the case of *United Malayan Banking Corporation Bhd v. Soo Lean Tooi & Ors* where the late Yusuf Abdul Rashid J had expressed the following opinion on s. 23(1)(b):

b In my opinion it is the intention of the Legislature to confer jurisdiction on the High Court of Malaysia under s. 23(1)(b) of Act 91 on a person who does not reside or has no place of business or has no property within local jurisdiction of the said High Court if such person is one of several Defendants who have been sued where the other Defendants are residing or have a place of business or have property within the local jurisdiction of the said High Court. Section 23(1)(b) of Act 91 would not have been worded so, had the intention of the Legislature been different. Should the words 'one of several defendants' been omitted, then the High Court would not have jurisdiction on a person who is one of the several defendants and who does not reside within the local jurisdiction thereof even if the other defendants are residing therein. Since the provisions of s. 23(1)(b) of Act 91 are in *pari materia* with the provisions of s. 16(1)(b) of the Singapore Act, the latter provisions should admit of the same construction.

e In interpreting s. 23(1)(b) of the Courts of Judicature Act, we must in general assume that the legislature knows the then existing state of the law on the jurisdiction of the High Courts under the Courts Ordinance 1948, and in construing an Act of Parliament where the words used by the legislature are precise and unambiguous, then the literal and strict construction rules should apply. There can be no doubt here that Parliament intends to confer on the High Court extra-territorial jurisdiction in cases where more than one defendants are being sued, so long as one of the several defendants resides or has his place of business within Malaysia.

f The learned counsel for the 1st defendant submitted that s. 23(1)(b) of CJA envisages that the defendant must be a defendant where the plaintiff has a cause of action. By implication what the learned counsel is saying that since the cause of action which is based on the trust arrangement is in Japan, then the 2nd defendant which is a Malaysian company, is not a proper defendant for this action.

g The court cannot agree with such argument. First, there is no such requirement in s. 23(1)(b). To introduce this requirement would tantamount to adding words to the provisions of the section which are precise and unambiguous. The literal and strict interpretation of the section should apply. It has been clearly held in *International Tin Counsel (supra)* that there can be no doubt that Parliament intends to confer on the Malaysian High Court extraterritorial jurisdiction in cases where more than one defendants are being sued, so long as one of the

several defendants resides or has his place of business within Malaysia. The court cannot add anything to the provision of the section if the provisions are so clear and unambiguous. It was also held in *International Tin Council (supra)*:

... As stated by Lord Halsbury LC in the *Solomon* case at p. 29, the Court has ‘no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sole guide must be the Act itself. The provisions of s. 23(1)(a) does not impose any condition relating to cause of action or the nature of the prayers being sought before the High Court can assume jurisdiction.

The position of the 2nd defendant in the action is not trivial. The 2nd defendant is a substantial and necessary defendant in the present action. This can be seen by the numerous references to the 2nd defendant in the statement of claim as well as prayer 27(3) of the statement of claim and prayer (c) of the plaintiffs’ application for injunction (encl. 3).

In the circumstances, the court is satisfied and hold that this court has jurisdiction to try this action by virtue of s. 23(1)(b) of CJA.

Forum Non-Conveniens

The 1st defendant’s alternative relief is that Malaysia is forum non-conveniens and this action should more properly be heard in Tokyo. On this issue, the 1st defendant must satisfy the court that notwithstanding that it has jurisdiction, there exists some other court or tribunal in Japan, of competent jurisdiction which is clearly and distinctly more appropriate than the Malaysian Court to try this action. The word ‘conveniens’ means suitability and appropriateness for the interest of all parties and also for the ends of justice. The ends of justice, is the paramount consideration. In *American Express Bank Ltd (supra)* it was held:

The fundamental principle in regards to the doctrine of forum non-conveniens is that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all parties and also for the ends of justice. The word “conveniens” here, however, means suitability and appropriateness of the relevant jurisdiction and not one of convenience.

The test for *forum non-conveniens* as laid out *American Express Bank Ltd (supra)* at p. 281 of the judgment of the Supreme Court is as follows:

... it will be obligatory for a Malaysian Court to consider in any event, a most important factor ie, whether “it would be unjust to the plaintiff to confine him to remedies elsewhere”. It is indispensable when a Malaysian Court considers all cases in connection with forum non-conveniens.

- a* The most important factor described above does arise, of course, out of a great variety of factors that a Malaysian Court ought to consider in applying the said doctrine; the prominent one being that whether any particular forum is one with which the action has the most real and substantial connection. One can easily visualize a large number of factors which overlap with one another.
- b* In the *Hooghly Mills Co. Ltd v. Seltron Pte Ltd* [1995] 1 SLR 773, the Singapore High Court held as follows:

However, where the plaintiffs have, as in this case, founded jurisdiction here as of right in accordance with Singapore law, the defendants' burden is not just to show that Singapore is not the natural or appropriate forum for the trial but to establish that there is another available forum which is clearly or distinctly more appropriate than the Singapore Court.

- c*
- From those authorities, 3 principles relating to forum non-conveniens emerge. They are:
- d* (a) that it is for the 1st defendant to show that a Japanese Court is an available forum which is "clearly and distinctly more appropriate" than the Malaysian High Court;
- (b) that the most important consideration is to ensure that the plaintiff will not suffer any injustice by requiring him to try his case in Japan;
- e* (c) that it is an important factor that the forum in which the case is heard is the one which has the most real and substantial connection with the action.

- f* As to first principle, the court is satisfied that the 1st defendant has failed to discharge his burden of showing that there is an available forum in Japan that is clearly or distinctly more appropriate than the Malaysian High Court. In this affidavit in support of the application (encl. 10) the 1st defendant merely says: "the High Court of Japan will be a more suitable and appropriate forum to try this action." This bald assertion does not assist this court. Nowhere has the 1st defendant explained whether such a court (the High Court of Japan)
- g* even exists nor has he given any details of the power or competent jurisdiction of that court. In particular, the 1st defendant has not shown that a court exists in Japan which has the power to issue binding orders on which not only binds the Japanese parties but also binds the 2nd defendant, which is a Malaysian company. Even more importantly, the 1st defendant has not shown that a Japanese Court has the power to grant binding orders in the terms of the relief sought *vide* the plaintiffs' application for injunction (in encl. 3) as well as the Statement of Claim. The 1st Defendant has not shown that a Japanese Court exists which has the power to grant an interim injunction to prevent the holding of an EGM of a Malaysian company (the 2nd defendant) which is to be held
- h* in Malaysia. The 1st defendant has not shown that a Japanese Court has the
- i*

power to prevent the 1st defendant from disposing of shares in a Malaysian company. The 1st defendant has also not shown that a Japanese Court has the power to regulate any orders that it makes in respect of the affairs of a Malaysian company. On this issue the 1st defendant has failed to meet the 1st threshold. He has neither identified an appropriate forum nor has he shown that forum has the power to grant and enforce the relief sought or to deal with the issues raised in this action.

*a**b*

The court finds that the High Court of Malaya at Kuala Lumpur is the proper forum to try this action. It is the only forum in which the plaintiffs may seek the relief claimed and it is the forum which has the most real and substantial connection with the action. The grounds for saying so (as set out at para. 7 and 8 of the affidavit of Yuji Hattori) may be summarised as follows:

c

(a) The action is based on a trust in respect of 5,000 shares held by the 1st defendant in the 2nd defendant. The trust shares are Malaysian shares, and the 2nd defendant is a Malaysian company;

d

(b) The trust was created as a result of agreements or commitments made by the 1st defendant with one Tan Sri Ramli Hussein, a Malaysian, in Malaysia;

(c) In this action, the plaintiffs seek not only a declaration of trust in respect of the Malaysian shares but also that those shares be transferred from the 1st defendant to the plaintiffs. That transfer process can only take place in Malaysia. In other words, the trust can only be enforced in Malaysia;

e

(d) The breach of trust on which the plaintiffs base their case is the refusal of the 1st defendant to effect the transfer of the trust shares to the plaintiffs. Again, this may only be effected in Malaysia;

f

(e) The 1st defendant's action, which compelled the plaintiffs to take out the application for the interim injunction, is his attempt to call an Extraordinary General Meeting to remove 6 directors of the 2nd defendant and to appoint 4 directors in their place. The notice convening the Extraordinary General Meeting is in exh. "YH9" of encl. 4. This court notice that 1 of the directors sought to be removed and 3 of the proposed appointees are Malaysians. Further, all the directors involved (whether current or proposed) are directors of a Malaysian company;

*g**h**i*

- a* (f) Further, control of the 2nd defendant leads to control of its main asset which is shares in a public company listed on the Kuala Lumpur Stock Exchange. It is the real fear that the 2nd defendant will dispose of the listed shares that led to the application for the injunction. Again, the Malaysian connection is irrefutable – the main asset of the 2nd defendant is Malaysian property in the form of shares on the KLSE;
- b*
- c* (g) Clearly, except for the plaintiffs and the 1st defendant, all relevant witnesses are Malaysians or reside in Malaysia. Even in the case of the plaintiffs and the 1st defendant, in so far as their investment in the 2nd defendant is concerned, their business is Malaysian based. The fact that they are foreigners is irrelevant. They have chosen to invest in a Malaysian company and the current dispute is centred on their Malaysian investment. The 1st defendant cannot now be heard to say that he wants this dispute decided in Japan;
- d* (h) The fact that the memorandum on which partially evidences the trust, was executed in Tokyo is irrelevant. What is relevant is that the enforcement of the trust was intended to take place in Malaysia.

e The main grounds on which the 1st defendant says that “the High Court of Japan” is the appropriate forum to try this action is that the plaintiffs and the 1st defendant are Japanese and that the MOU was executed in Japan and that the shareholders of the 2nd defendant are Japanese. Those arguments are weak and unconvincing. Certainly they do not show with any degree of certainty or conviction that there is a more appropriate forum in Japan to try this action.

f **Conclusion**

To summarise the above considerations the court finds that:

- (a) this court has the jurisdiction to try this action under s. 23(1)(b) of CJA 1964;
- g* (b) on the question of *forum non-conveniens* the 1st defendant has failed to discharge the burden of showing that another forum exists which is clearly and distinctly more appropriate to try this action;
- (c) in any event, Malaysia is *forum conveniens* to try this action as it has the most real and substantial connection with the action. Further it would be unjust and inappropriate to require the plaintiffs to seek their relief elsewhere.
- h*

For the above reasons, the 1st defendant’s application *vide* encl. 11 is dismissed with costs.

i